No. 18-422

IN THE

Supreme Court of the United States

ROBERT A. RUCHO, *et al.*,

Appellants,

—v.—

COMMON CAUSE, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

MOTION TO AFFIRM BY THE *COMMON CAUSE* APPELLEES

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QUESTIONS PRESENTED

1. Whether the District Court correctly held that Appellees have Art. III standing to challenge the 2016 North Carolina Congressional Plan and its individual districts as unconstitutional partisan gerrymanders?

2. Whether the District Court correctly held that, on the facts of this case, Appellees' claims are justiciable and do not present "political questions"?

3. Whether the District Court correctly held that the 2016 Plan and 12 of its 13 individual districts violate the First Amendment, Equal Protection Clause, and/or Art. I?

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INTRODUCTION

The 2016 North Carolina Congressional Plan ("2016 Plan" or "Plan") is the most overt partisan gerrymander this Court has ever seen. The written criteria that governed the redistricting process, formally adopted by a party-line vote of the General Assembly's Joint Redistricting Committee, commanded the map-drawer to pursue "Partisan Advantage" for the Republican Party. Indeed, those criteria *expressly dictated* a quota of "10 Republican" districts and just "3 Democrat[ic]" ones—despite a near-equal split among the State's voters. To implement this directive, the map-drawer admittedly "packed" as many Democrats as possible into three overwhelmingly blue districts and "cracked" the remainder across ten red ones. The only reason the Plan did not contain even fewer Democratic districts was because it was "not ... possible to draw [such] a map." The heads of the Joint Redistricting Committee, Appellants here, publicly declared that the Plan was intended "to gain partisan advantage" for their side because "electing Republicans is better than electing Democrats." One even proclaimed: "I acknowledge freely that [the Plan is] a political gerrymander."

This egregious self-entrenchment is "incompatible with democratic principles," *Ariz. State Legis. v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2658 (2015), and "jeopardizes 'the ordered working of our Republic, and of the democratic process,'" *Gill v. Whitford*, 138 S. Ct. 1916, 1940 (2018) (Kagan, J., concurring) (quoting *Vieth v. Jubelirer*, 541 U.S. 267, 316 (2004) (Kennedy, J., concurring)). As the Chief Justice observed, "those who govern should be the *last* people to ... decide who *should* govern."

McCutcheon v. FEC, 572 U.S. 185, 192 (2014). Yet that is what North Carolina's legislative majority did here—openly and shamelessly.

As the District Court held, Appellants' actions violate multiple, well-established constitutional restraints. By burdening the speech and association rights of Appellees (which include the North Carolina Democratic Party and individual Democratic voters) based on their viewpoint and identity, the Plan violates the First Amendment. By intentionally discriminating against Appellees without any legitimate justification, the Plan violates the Equal Protection Clause. And by nakedly dictating the outcomes of federal elections, the Plan exceeds Art. I's limited grant of power to the States. None of these principles is the least bit novel, and nothing in this Court's jurisprudence suggests that they are inapplicable to redistricting.

Appellants do not attempt to defend their actions as consistent with these settled principles. Instead, they hide behind a smokescreen of unsound standing and justiciability arguments.

As for standing, Appellants all but ask this Court to overrule *Gill v. Whitford*, unanimously decided just months ago. *Gill* held that the plaintiff in a partisan-gerrymandering case establishes Art. III standing on a vote-dilution theory by proving that his or her district was "packed" or "cracked." 138 S. Ct. at 1930-31. The District Court found that 12 of the Plan's 13 districts were intentionally packed or cracked, and at least one voter-plaintiff resides in each district. Appellants do not dispute these facts; rather, they insist—contrary to *Gill*—that a voter who lives in an

intentionally packed or cracked district suffers no injury. If that were so, there would have been no reason to remand *Gill* to allow the plaintiffs to prove what Appellees here have proved: "that [they] live in districts where Democrats ... have been packed or cracked." *Id.* at 1934. Meanwhile, Appellants virtually ignore the District Court's undisputed findings that Appellees also proved classic *non*-dilutionary injury to their rights of speech and association.

As to justiciability, Appellants assert that challenges to partisan gerrymanders, whatever their facts or legal theories, are "political questions" beyond the judicial ken. This is so, they say, because there is no "limited and precise test" that separates constitutional maps from unconstitutional ones. JS28. But the District Court's "tests" were taken directly from this Court's precedents and are perfectly up to the task. And regardless, the political question doctrine calls for a fact-specific, case-by-case inquiry to assess whether the relevant issue is "susceptibl[e] to judicial handling ... in *the specific case*." *Baker v. Carr*, 369 U.S. 186, 211-12, 217 (1962) (emphasis added). Whatever difficulties courts may face in adjudicating other partisan-gerrymandering cases, there are no such difficulties here, where the formally adopted redistricting criteria are facially discriminatory. Indeed, Appellants' counsel has *conceded* before this Court that facially discriminatory districting is unconstitutional.

Given that facial discrimination, the admissions in the record, and the absence of any factual disputes, the Court could easily resolve this appeal through summary affirmance, saving for another day the

question of how to handle cases where extraordinary circumstances like these are absent. In all events, the judgment should be affirmed.

STATEMENT OF THE CASE

A. Factual Background

1. The 2011 Plan

North Carolina is a "purple state," its voters split almost equally between support for Democratic and Republican candidates. A13-14. Its congressional delegation once reflected this, often dividing 7-6 or 6-7. That changed markedly when the Republican Party captured the General Assembly in 2010, "giving [it] exclusive control over the ... redistricting process." A10. On a party-line vote, it adopted a new congressional map (the "2011 Plan") that yielded a 9-4 Republican supermajority in the 2012 election, even though Democratic candidates received more votes statewide. A13. That advantage grew to 10-3 in 2014, even though Republican candidates received only 54% of the vote. A13-14.

This Court reviewed the 2011 Plan in *Cooper v. Harris*, 137 S. Ct. 1455 (2017), which alleged that two of its districts were racially gerrymandered. The State's "defense" was that the 2011 Plan was actually a *partisan* gerrymander. The map-drawer, Dr. Thomas Hofeller, testified that partisanship "was the primary ... determinant in the drafting"—*i.e.*, that his "primary goal" was "to create as many districts as possible in which GOP candidates would be ... successful[]" and "to minimize the number of districts in which Democrats ... [could] elect a Democratic candi-

date." A180. Before this Court, the State's counsel—who represents Appellants here—explained that Hofeller "drew the map to draw the Democrats in[to 'packed' districts] and the Republicans out [of them]." Oral Argument Tr., *Cooper v. Harris*, No. 15-1262 (Dec. 6, 2016) at 10-11 (argument of Paul D. Clement). This Court affirmed the judgment invalidating the two challenged districts as predominantly race-motivated, without disputing the State's admission as to the remaining districts and the 2011 Plan overall.

2. Creation Of The 2016 Plan

In February 2016, the district court in *Harris* ordered a remedial map. The heads of the Joint Redistricting Committee, Rep. David Lewis (R) and Sen. Robert Rucho (R), instructed Hofeller to remedy the two invalidated districts' racial infirmities while "maintain[ing]" the predetermined partisan split of "10 Republicans and 3 Democrats." A14-15. Hofeller used past election results "to create a composite partisanship variable indicating whether, and to what extent, a particular precinct was likely to support a Republican or Democratic candidate." A16, 157-158. As Hofeller testified, this information is highly predictive of future voting patterns. *Ibid.* Hofeller then used that partisanship index to guide his line-drawing, with the admitted goal of "cracking" and "packing" Democrats to minimize their voting strength. A17, 158-59. In so doing, Hofeller "divide[d] counties and communities of interest along partisan lines, and join[ed] sections of the state that have little in common." A252.

Lewis then presented for the Joint Redistricting Committee's retroactive approval a set of written "cri-

teria" that Hofeller had employed. A19-21. Several were explicitly partisan. Most obviously, the criterion labeled "Partisan Advantage" stated:

> The partisan makeup of the congressional delegation ... is 10 Republicans and 3 Democrats. The Committee shall make reasonable efforts to construct districts in the 2016 ... Plan to maintain the current partisan makeup of North Carolina's congressional delegation.

Another criterion, "Political data," stated that "[t]he only data other than population data to be used ... shall be election results in statewide contests since January 1, 2008...." A20. Hofeller agreed that the 2016 Plan "adhered to the Committee's Partisan Advantage and Political Data criteria." A23. The Committee adopted these partisan criteria on party-line votes. *Ibid.* Both chambers of the General Assembly then approved the 2016 Plan, also "by party-line votes." A24.

Lewis proclaimed the intentions behind the Plan on the record, both during Committee hearings and on the House floor:

- "[W]e want to make clear that to the extent we are going to use political data in drawing this map, it is to gain partisan advantage."
- "I propose that we draw the maps to give a partisan advantage to 10 Republicans and 3 Democrats because I do not believe it's possible to draw a map with 11 Republicans and 2 Democrats."

- "I think electing Republicans is better than electing Democrats. So I drew this map to help foster what I think is better for the country."

- "I acknowledge freely that [the 2016 Plan] would be a political gerrymander, which is not against the law."

Rucho agreed, stating that there is "nothing wrong with political gerrymandering" because "[i]t is not illegal." A22-24. On this basis, the resulting Plan was enacted as law by the North Carolina legislature.

3. Effect Of The 2016 Plan

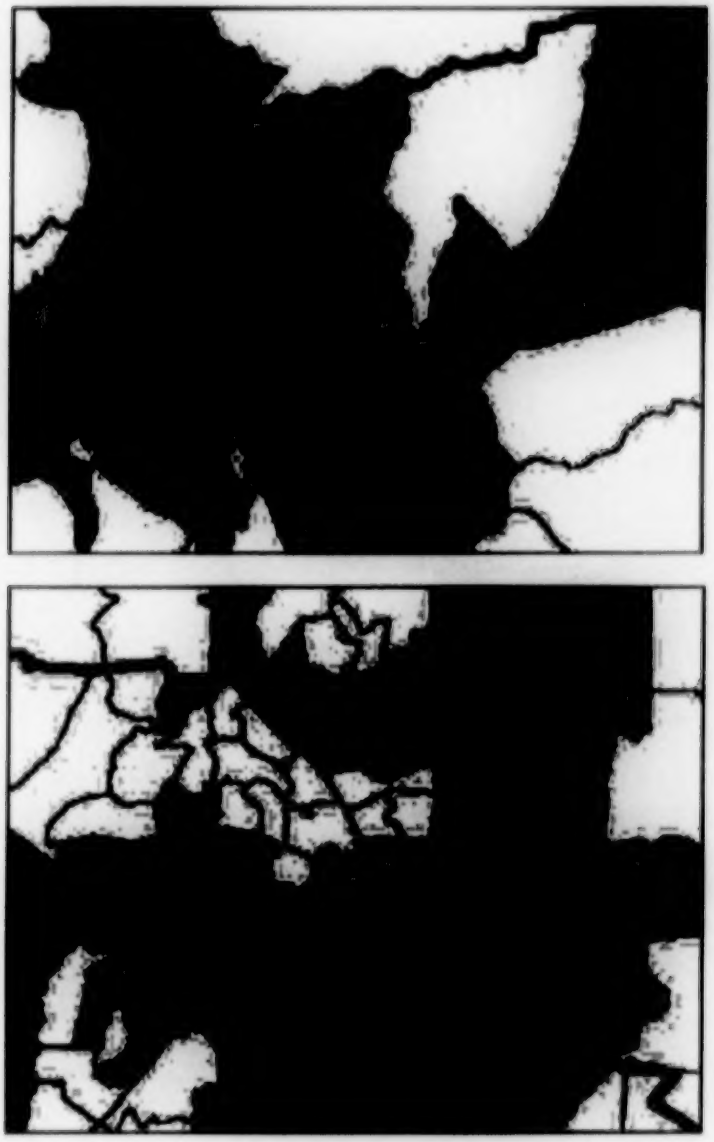
In the 2016 election, Republicans prevailed in all ten cracked districts where they were "intended and expected ... to prevail," and Democrats prevailed in the three packed districts drawn to be "predominantly Democratic." A26. Republican candidates thus won 77% of the total seats despite receiving just 53% of the statewide vote. *Ibid.* Not one district had a competitive race. A190.

The 2016 Plan's intentional packing and cracking harmed Appellees at the district level by diluting their votes. A51-65, 74, 82-83. For example, Appellees Coy E. Brewer, Jr. and John McNeill are Democratic voters in the heavily Democratic Fayetteville area. A57-59. The Plan intentionally cracked that area (shown in blue on the map below) and submerged the pieces within heavily Republican Congressional Districts ("CDs") 8 and 9:

Appellants' expert "conceded that [this] area constituted a 'cluster of Democratic' [voters] that the 2016 Plan 'split,'" and that absent this "crack[ing]," either CD 8 or CD 9 "would not have been a safe Republican district." A252-53. Due to this cracking, Brewer was relegated to CD 8 and McNeill to CD 9, intentionally wasting their votes. A57-59, 251-255.

Similar district-specific harms were visited on Appellees across the State. For example, both Appellant Lewis and Appellants' expert conceded that the 2016 Plan "split Buncombe County and the City of Asheville, where Democratic voters are concentrated, between [safe-Republican] Districts 10 and 11" (below top), A25, and "'cracked' ... the Democratic city of Greensboro between Republican Districts 6 and 13"

(below bottom), A158; *see also* A186-187, 216-217, 271.



Appellees residing in the resulting districts had their votes intentionally wasted, including Democratic voters Robert Warren Wolf (CD 10), Jones P. Byrd (CD 11), Melzer A. Morgan, Jr. (CD 6), and Russell G. Walker, Jr. (CD 13). A56-57, 60-61, 62-63, 70, 243-248, 259-266, 270-273.

In addition, because of the 2016 Plan, the North Carolina Democratic Party and its member-plaintiffs residing in every district in the State undisputedly suffered a "decreased ability to mobilize their party's base, persuade independent voters to participate, attract volunteers, raise money, and recruit candidates." A70.

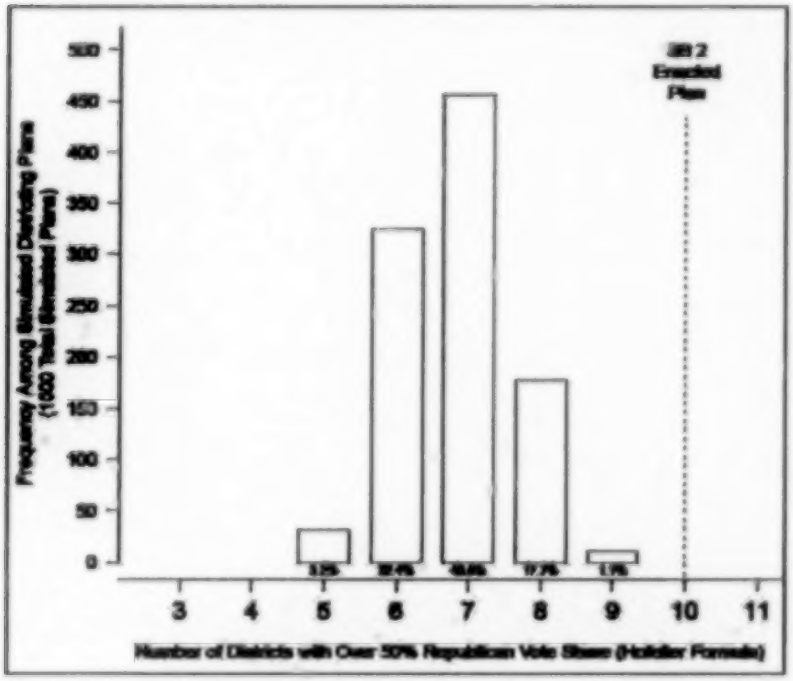
B. Proceedings Below

1. Trial and Appeal

In August 2016, *Common Cause* Appellees—14 voters from all 13 districts in the 2016 Plan, the North Carolina Democratic Party, and the nonpartisan organization Common Cause—filed a complaint challenging the Plan under the First Amendment, Equal Protection Clause, and Art. I, §§ 2 and 4. The case was consolidated with *League of Women Voters of N. Carolina v. Rucho*, No. 1:16-cv-1164 (M.D.N.C.), which also challenged the plan as a partisan gerrymander. In October 2017, the District Court held a four-day bench trial. As the facts were essentially undisputed, the trial focused on expert testimony.

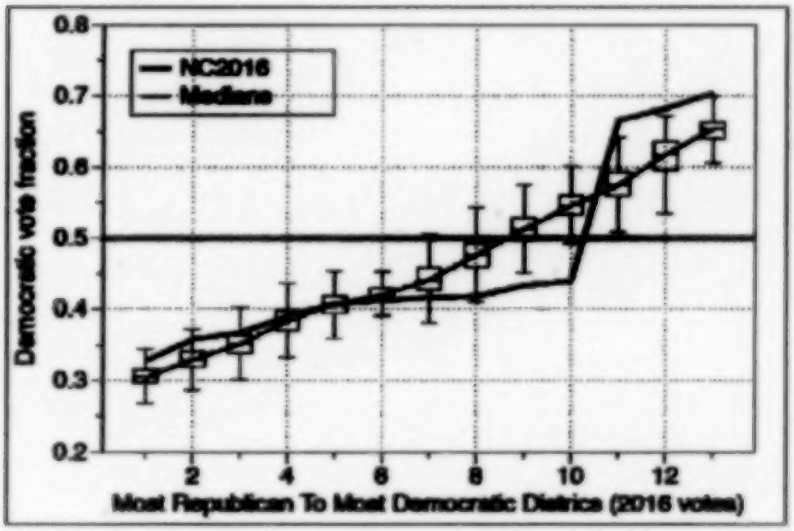
Common Cause Appellees presented testimony from Dr. Jonathan C. Mattingly, a mathematician at Duke University, and Dr. Jowei Chen, a political sci-

entist at the University of Michigan. A160, 167. They used computer algorithms to generate thousands of alternative districting maps using only traditional criteria and disregarding partisan data. Next, they used actual election results from each precinct statewide to simulate hypothetical elections under each alternative map. The results were striking. Dr. Chen generated 3,000 alternative maps under which the composition of North Carolina's delegation formed a bell curve (shown below), mostly split 7-6 or 6-7. None of Dr. Chen's 3,000 maps yielded a Republican advantage as great as the 10-3 split of the 2016 Plan (shown by the dashed red line). A167-171.



Dr. Mattingly, meanwhile, generated over 24,000 alternative maps using traditional nonpartisan criteria. Fewer than 0.7% of them resulted in a Republican advantage as lopsided as 10-3. A162.

Dr. Mattingly also corroborated the packing and cracking of individual districts. He showed this by plotting the Democratic vote share of each district on a graph, with the most Republican on the left and the most Democratic on the right. With no packing or cracking, the median map in Dr. Mattingly's simulation set yields a straight line (in yellow below). By contrast, the plot for the 2016 Plan (in blue) resembles an "S" curve, with Democratic voters packed into overwhelmingly Democratic districts at the top of the "S" or cracked across safe Republican districts at the bottom. A163-166.



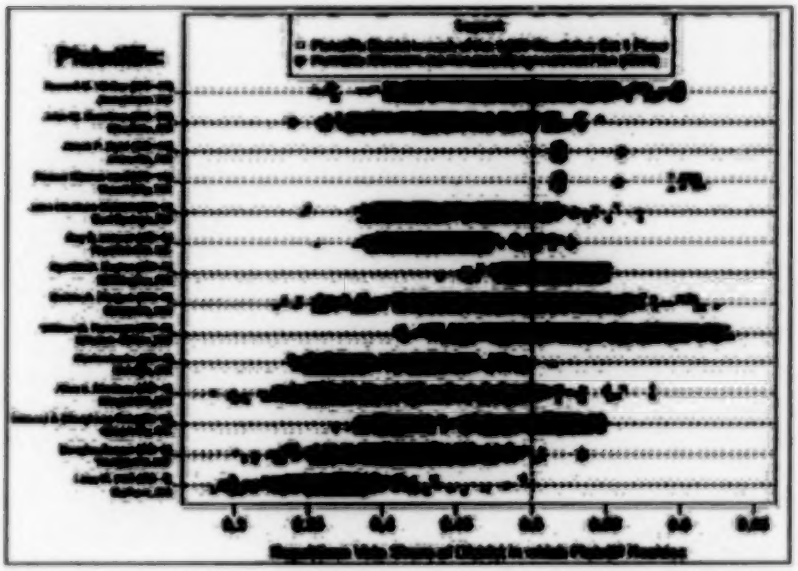
In January 2018, the District Court held that Appellees had standing to challenge the 2016 Plan on a statewide *and* district-by-district basis, and that the Plan violates the First Amendment, the Equal Protection Clause, and Art. I, §§ 2 and 4. *Common Cause v. Rucho*, 279 F. Supp. 3d 587 (M.D.N.C. 2018). This Court stayed the judgment pending appeal. On June 25, 2018, this Court vacated and remanded for consideration in light of *Gill v. Whitford*, 138 S. Ct. 1916 (2018), which held that, when proceeding under a vote-dilution theory, partisan-gerrymandering plaintiffs must establish standing by showing that the district in which they reside is "cracked" or "packed."

2. Remand

On remand, the District Court requested briefing on the impact of *Gill*. Besides highlighting the packing and cracking evidence already in the record, *Common Cause* Appellees submitted a supplemental declaration from Dr. Chen.

Dr. Chen used each *Common Cause* voter-plaintiff's residential address to determine the district in which that plaintiff would have resided in 1,000 of the alternative maps he had previously generated. He then determined how the partisan vote split of each plaintiff's actual district under the 2016 Plan compares to the vote split of the array of "hypothetical district[s]" in which he or she might have been placed. A51 (quoting *Gill*, 138 S. Ct. at 1931). The results are shown below. For each plaintiff, the gray horizontal band—actually 1,000 individual gray circles—depicts the partisan vote split in each alternative district in which he or she might have been

placed. The red star indicates the partisan vote split of each plaintiff's actual district under the 2016 Plan.



This analysis further evidences that the districts where these voter-plaintiffs live were packed or cracked. Specifically, all the plaintiffs who reside in majority-Republican districts under the 2016 Plan (where the red stars are to the right of the dashed line) would have resided in more Democratic-leaning districts in the overwhelming majority of alternative maps. A52-53, 57-59, 61. And all the plaintiffs who reside in majority-Democratic districts under the 2016 Plan (where the red stars are to the left of the dashed line) would have resided in less Democratic-leaning districts in virtually all alternative maps. A51-52, 54, 62.

On August 27, 2018, the District Court issued a new opinion. The majority held that at least one

plaintiff had standing to challenge each of the 2016 Plan's 13 districts under a vote-dilution theory and that the plaintiffs further had non-dilutionary standing to challenge the Plan as a whole. A3. Judge Osteen agreed that at least one plaintiff had standing to challenge 10 of the Plan's 13 districts under a vote-dilution theory, but disagreed (contra *Gill*) that voters living in *packed* districts suffer dilutionary injury. A330. The District Court also held unanimously that Appellees' claims were justiciable and not "political questions." A33-35.

On the merits, the majority held that 12 of the Plan's 13 districts (all except CD 5) violate the Equal Protection Clause, because they were drawn with the predominant intent to discriminate against Democratic voters and no legitimate—let alone compelling—state interest justifies this discrimination. A227. Judge Osteen agreed that the nine of those 12 districts that were *cracked* violate the Equal Protection Clause. A365 n.4. The majority also held that the Plan violates the First Amendment because, *inter alia*, it constitutes viewpoint and speaker-based discrimination, and because there is no legitimate justification for these burdens. A283. Finally, the Court held unanimously that the Plan violates Art. I, §§ 2 and 4, because it was nakedly intended to "dictate [federal] electoral outcomes." A303.

Because it was impracticable to redistrict in time for the November 2018 elections, the District Court stayed its judgment on the condition, accepted by Appellants, that this appeal be pursued expeditiously.

ARGUMENT

I. *COMMON CAUSE* APPELLEES HAVE STANDING

The District Court correctly held that *Common Cause* Appellees suffered Art. III injury-in-fact. First, the voter-plaintiffs (and the North Carolina Democratic Party on behalf of its members) pleaded and proved that each of the Plan's districts was packed or cracked, establishing vote-dilution standing under *Gill*. A3. Second, both the voter and organizational plaintiffs pleaded and proved burdens on their rights of speech and association. A74. Third, these same injuries-in-fact also afforded Appellees standing to challenge the 2016 Plan as *ultra vires* under Art. I. A309.

Appellants, however, insist that *no* plaintiff proved injury-in-fact under *any* theory. Their arguments mischaracterize Appellees' claims and fly in the face of precedent.

A. The *Common Cause* Appellees Proved Dilutionary Injury-in-Fact

Gill addressed Equal Protection claims brought by voter-plaintiffs asserting vote-dilution harm. That harm, the Court recognized, "arises through a voter's placement in a 'cracked' or 'packed' district." 138 S. Ct. at 1931. Although several plaintiffs had *alleged* that their districts' lines were the result of packing or cracking, they had not "followed up with ... proof." *Id.* at 1923, 1931-32. The Court remanded, affording them "an opportunity to prove" that they "live in districts where Democrats ... ha[d] been packed or cracked," and thereby establish standing. *Id.* at 1934.

Here, by contrast, *Common Cause* Appellees "alleged, argued, and prove[d] district-specific [vote-dilution] injuries *throughout* the course of this litigation." A41. The District Court methodically catalogued the undisputed packing and cracking evidence for each district and the Plan as a whole. A223-274. For example, Dr. Hofeller, the map-drawer, conceded that his aim was to "pack" Democrats into three specific districts (CD 1, 4, and 12) and "crack" them across the remaining ten; *Common Cause* voter-plaintiffs (and members of the North Carolina Democratic Party) live in each of these districts. A12. Appellants and their expert conceded that the Plan intentionally split specific Democratic clusters where these voter-plaintiffs live. A216. And Drs. Mattingly and Chen's expert analyses confirmed that the Plan's individual districts were packed or cracked, and that the votes of their Democratic residents "would have carried greater weight" in virtually any "other 'hypothetical district.'" A51 (quoting *Gill*, 138 S. Ct. at 1931). This is exactly what *Gill* requires.

Ignoring the pleadings, the evidence, and the District Court's findings, Appellants insist that this case "has always been an effort to vindicate a generalized preference to see more Democrats from North Carolina elected to Congress." JS18. Not so. "[E]ach individual *Common Cause* plaintiff alleged in their complaint"—and subsequently proved—"that his or her vote [was] 'diluted or nullified as a result of his [or her] placement in his or her particular district.'" A41 (cleaned up). That is not a "generalized" grievance about the composition of North Carolina's congressional delegation, but rather one about the intention-

al debasement of each plaintiff's personal vote through the drawing of his or her own district's lines. Supposedly to support their argument, Appellants cite testimony from three voter-plaintiffs in the *League of Women Voters* case (not the *Common Cause* case) who testified that their only grievance with the 2016 Plan was its statewide imbalance. JS18-19 (citing A66-67). But, based on that testimony, the District Court *rejected* the standing of those three plaintiffs to bring vote-dilution claims. Their failure of proof does not taint the separate claims of the *Common Cause* voter-plaintiffs, who live in each of the Plan's districts and who *did* assert and prove district-specific dilutionary injury via packing and cracking. A42. Nor does their testimony undermine the separate claim of the North Carolina Democratic Party, which asserted and proved district-specific dilutionary injury on behalf of its members throughout the State. A63-65.

Appellants also argue that, in some districts, the Plan's manipulation may not have changed the bottom-line electoral outcome. JS20-21. But *Gill* did not hold that the injury in a vote-dilution claim is the deprival of one's preferred election result. The injury, rather, is that the "composition of [a] voter's own district ... causes his vote—having been packed or cracked—to *carry less weight*...." 138 S. Ct. at 1930-31 (emphasis added). A voter whose preferred candidate won, or would have lost regardless, is perfectly capable of suffering this form of vote devaluation.[1]

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[1] Appellants' comparison of *Common Cause* plaintiff Larry Hall with William Whitford, "the lead plaintiff in *Gill*," JS20, is thus inapt. The reason Whitford lacked vote-dilution standing was *not* because his representative would have been a Democrat

See Gill, 138 S. Ct. at 1936 (Kagan, J., concurring); *cf. N.E. Fla. Chapter, Assoc. Gen. Contractors of Am. v. Jacksonville*, 508 U.S. 656, 666 (1993) ("The 'injury-in-fact' in an equal protection case ... is the denial of equal treatment ..., not the ultimate inability to obtain the [desired] benefit."). For this same reason, even if the November 2018 election is a "wave" election and one or more of North Carolina's seats flip to Democratic control, the vote-dilution injury to Democratic voters in those districts would be unchanged.

Since Appellants cannot deny that *Common Cause* Appellees satisfied *Gill*, they attack *Gill* itself, arguing that the injury the Court unanimously recognized in that case is no injury at all. JS22. They maintain that whenever a voter complains that his or her personal vote has been diluted through packing or cracking, that voter is *really* just complaining of an "inability to add another Democrat [or Republican] to the overall composition of the legislature"—and thus, expressing a "repackaged version of a non-cognizable desire to influenc[e] the legislature's overall ... policymaking." JS20, 22 (cleaned up). This is verbal sleight-of-hand. That vote-dilution plaintiffs may *also* desire a legislature that reflects their policy preferences does not mean that they are not aggrieved by the "individual and personal" dilution of their votes. *Reynolds v. Sims*, 377 U.S. 533, 561 (1964); *cf. Baker*,

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"under any plausible circumstances," *ibid.*, but because his district was neither packed nor cracked: "the Democratic share of the ... vote" in his district was *exactly the same* under both the challenged plan and "the plaintiffs' ideal map." 138 S. Ct. at 1924-25. Here, by contrast, 1,997 of Dr. Chen's 2,000 alternative maps "would have placed [Larry] Hall into a less Democratic-leaning district." A22.

369 U.S. at 226-27 (that plaintiffs "might conceivably have added a claim under the Guarantee Clause" that courts could not hear "does not [mean] that [they] may not be heard" on the vote-dilution claims "which in fact they tender").

Crediting Appellants' argument would not only eviscerate *Gill*; it would also undo much of this Court's other voting-rights jurisprudence. By Appellants' reasoning, an urban plaintiff who brings a one-person-one-vote claim is not *actually* complaining about the dilution of her vote; she is really just dissatisfied with urban voters' "inability to add" more representatives who support their interests "to the overall composition of the legislature." By similar thinking, a racial-gerrymandering plaintiff who alleges that his district resulted from cracking of minority voters is not actually complaining about being sorted by his race; he is *really* just aggrieved with minority voters' "inability to add" more minority-preferred representatives "to the overall composition of the legislature." Of course, the plaintiffs in such cases may hope that their success will ultimately impact the legislature's "overall composition." But that has never been grounds for ignoring the personalized harm of which they complain.

B. *Common Cause* Appellees Also Proved Non-Dilutionary Injury-in-Fact

"[P]artisan gerrymanders inflict other kinds of constitutional harm" beyond vote dilution. *Gill*, 138 S. Ct. at 1938 (Kagan, J., concurring); *see also Vieth*, 541 U.S. at 314 (Kennedy, J., concurring). The District Court found such non-dilutionary injury here based on undisputed evidence, and it correctly held

that these injuries support standing. Specifically, it found—and Appellants do not dispute—that the 2016 Plan burdened Appellees' rights of political speech and association, exactly as Appellants intended.

The voter-plaintiffs gave unopposed testimony that the Plan "decreased [their] ability to mobilize their party's base, persuade independent voters to participate, attract volunteers, raise money, and recruit candidates." A50. These are classic injuries-in-fact. *See Anderson v. Celebrezze*, 460 U.S. 780, 792 (1983) (election law inflicted cognizable "burden" on association by making "[v]olunteers ... more difficult to recruit," "contributions ... more difficult to secure," and "voters ... less interested in the campaign"). And "what [was] true for" the voter-plaintiffs was "triply true" for the North Carolina Democratic Party. A71 (quoting *Gill*, 138 S. Ct. at 1938) (Kagan, J., concurring). The Party's entire *raison d'être* is to engage in political activity and association, and it was undisputed that the Plan "weaken[ed]" its capacity "to perform all its functions." *Ibid.* It is hard to imagine a more concrete and personal injury-in-fact to a political party. *See, e.g., Colo. Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 615-16 (1996) (striking down law that hampered party's ability to "convince others to join").

Rather than dispute the District Court's factual findings that Appellees suffered these burdens, Appellants argue that they do not constitute injuries-in-fact because Appellees remain "free ... to run for office, express their political views, endorse and campaign for their favorite candidates, vote, or otherwise [engage in political] expression." JS23. On countless

occasions, however, this Court has found that voters, candidates, and parties have standing to challenge laws that stop short of altogether denying them the franchise; completely barring their candidacy; or flatly forbidding them to speak. *See, e.g.*, *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 728 (2011) (public "matching funds" law injured opponents of candidates receiving such funds, even though they remained free to speak as they wished); *Cal. Democratic Party v. Jones*, 530 U.S. 567, 580-81 (2000) ("blanket primary" law injured political parties even though they remained "free to endorse and financially support the candidate of their choice"); *Kusper v. Pontikes*, 414 U.S. 51, 58 (1973) (2-year waiting period to vote in party primary injured voters, even though it "d[id] not ... deprive [them] of all opportunities to associate with the political party of their choice"); *Terry v. Adams*, 345 U.S. 461, 483-84 (1953) (plurality) (white pre-primary system injured black voters even though the franchise was "nominally open to [them]").

Appellants also dispute that these non-dilutionary injuries afford standing to challenge the 2016 Plan as a unitary enactment. But that is as it should be. Vote-dilution claims are district-specific because citizens vote only in one district—their own. *Gill*, 138 S. Ct. at 1930. By contrast, "the associational injury flowing from a statewide partisan gerrymander ... has nothing to do with the packing or cracking of any single district's lines." *Id.* at 1938-39 (Kagan, J., concurring). Democrats from Asheville fundraise for candidates in Fayetteville; Democrats from Raleigh conduct voter outreach in Charlotte; and the Party itself does these things statewide. The 2016 Plan, the

District Court found, burdened all of these activities. Where, as here, "the harm alleged is not district specific, the proof needed for standing should not be district specific either." *Ibid.*

II. *COMMON CAUSE* APPELLEES' CLAIMS ARE JUSTICIABLE

Appellants next argue that cases involving partisan gerrymanders present nonjusticiable "political questions." This argument fails, both in general and especially in this case.

"[T]he Judiciary has a responsibility to decide cases properly before it, even those it would gladly avoid." *Zivotofsky v. Clinton*, 566 U.S. 189, 194 (2012). The political question doctrine is "a narrow exception to that rule." *Ibid.* Despite the name, it is not implicated "merely because [a suit] ha[s] political implications." *Id.* at 196. Rather, a case must threaten "the separation of powers" between "the judiciary and the coordinate branches of the Federal Government." *Baker*, 369 U.S. at 210, 217. Cases implicating "the federal judiciary's relationship *to the States*," as this one does, cannot "give[] rise to [a] 'political question'" in the necessary sense. *Ibid.* (emphasis added); *see Davis v. Bandemer*, 478 U.S. 109, 123 (1986) (partisan-gerrymandering claims "do[] not involve [this Court] in a matter more properly decided by a coequal branch of our Government").

Nor does this case exhibit any of *Baker*'s other hallmarks of "political questions." 369 U.S. at 217. Appellants briefly argue that, under the first *Baker* factor, the Elections Clause is a "textually demonstrable ... commitment" of plenary authority to State

legislatures (or, alternatively, the United States Congress). JS27-28. But the Court rejected this argument over half a century ago, holding that "nothing in the language of" the Elections Clause "immunize[s] state congressional apportionment laws which debase a citizen's right to vote from the power of courts to protect the constitutional rights of individuals from legislative destruction." *Wesberry v. Sanders*, 376 U.S. 1, 6-7 (1964); *see also Cook v. Gralike*, 531 U.S. 510, 522-23 (2001) (invalidating state election regulation under Elections Clause); *U.S. Term Limits v. Thornton*, 514 U.S. 779, 805 (1995) (same). It is inconceivable that the Framers—who intended the Constitution to prevent "interested and overbearing majorit[ies]" from trampling "the rights of the minor party," The Federalist No. 10 (Madison)—meant the Elections Clause to be an affirmative grant of permission to engage in extreme partisan self-entrenchment.

Appellants chiefly argue the second *Baker* factor: "lack of judicially discoverable and manageable standards for resol[ution]." 369 U.S. at 217. But, as *Baker* recognized, "[j]udicial standards under the Equal Protection Clause are well developed and familiar," *id.* at 226, and so are standards under the First Amendment and Elections Clause. Merely shifting the *basis* of the alleged discrimination in districting from geography or race—claims long recognized as justiciable—to political creed or expression does not change the fact that "judicial standards" exist to detect and remedy invidious discrimination in districting. *See Davis*, 478 U.S. at 125.

Appellants nevertheless maintain that there are no "judicial standards" because there is supposedly no

single test that will delineate "how much partisanship is too much" in drawing district lines. JS15. This argument fails for several reasons. First, even if other cases might present adjudicative difficulties, cases of this type—involving facially discriminatory state action—could hardly be simpler to adjudicate. Second, Appellants' line-drawing conundrum stems from asking the wrong question. The right question is not one of *quantity* ("how much partisanship is too much?"), but one of *kind* ("was the purpose of the map-drawers' reliance on partisan data an invidious one?"). Finally, that the District Court's tests permit consideration of social-science evidence is no flaw, and does not sound in justiciability in any event.

A. Appellants' Constitutional Violation Is Manifest Under *Any* Standard

Appellants would have the Court pronounce *all* challenges to partisan gerrymanders nonjusticiable. But the political question doctrine calls for "case-by-case inquiry," not "blanket rule[s]" or "semantic cataloguing." *Baker*, 369 U.S. at 210-11, 215-16. Courts must make a "discriminating inquiry into the precise facts and posture of *the particular case*" and determine the issue's "susceptibility to judicial handling ... in *th[at] specific case*." *Id.* at 211-12, 217 (emphasis added). The question, then, is not whether "partisan gerrymandering" cases as a category are judicially determinable, but whether the claims in *this* case are. The answer to that question is yes: as several Justices have suggested, and as Appellants' counsel has conceded, districting plans designed under a *facially* discriminatory mandate are unconstitutional.

In *Vieth*, Justice Kennedy observed that if "a State passed an enactment that declared" expressly that districts "shall be drawn ... to burden" one party, "we would surely conclude that the Constitution had been violated." 541 U.S. at 311-12. At oral argument in last Term's partisan-gerrymandering cases, Justice Kennedy asked again whether a law expressly requiring partisan favoritism in districting would violate the Constitution. *See* Oral Argument Tr., *Gill v. Whitford*, No. 16-1161 (Oct. 3, 2017) at 26; Oral Argument Tr., *Benisek v. Lamone*, No. 17-333 (Mar. 28, 2018) at 45. In both cases, counsel for the defendant agreed that it would. So did counsel for the legislative *amici* in *Gill*, who also represents Appellants here:

> JUSTICE KENNEDY: ... If the state has a law ... saying all legitimate factors must be used in a way to favor party X or party Y, is that ... an equal protection violation or First Amendment violation? ...
>
> MS. MURPHY: Yes. It would be ... unconstitutional, if it was on the face of it.

Gill Tr. 26-27.

In *Benisek*, Justice Kagan asked a similar question and received the same answer from the defendants' counsel:

> JUSTICE KAGAN: ... Suppose the Maryland legislature passed a statute and said, in the next round of reapportionment, we're going to create seven Democratic districts and one Republican district?

> MR. SULLIVAN: ... It would be [viewpoint discrimination] on its face.

Benisek Tr. 47.

As Justice Alito observed, if nothing else, a "manageable standard" exists to adjudicate cases of *this* type:

> JUSTICE ALITO: ... It's not a manageable standard that you cannot have a law that [expressly] says draw maps to favor one party or the other[?] *That seems like a perfectly manageable standard.*

Gill Tr. 20:8-15 (emphasis added).

This is the case that Justice Kennedy described in *Vieth* and Justices Kennedy, Kagan, and Alito postulated last Term. North Carolina formally adopted binding written criteria *expressly* requiring a "Partisan Advantage" for Republicans, and even a quota of "10 Republicans" and "3 Democrats." For good measure, Appellants Lewis and Rucho, who led the Redistricting Committee, proclaimed that the Plan's "intent" was to implement their belief that "electing Republicans is better than electing Democrats." As Justice Alito observed, it is "perfectly manageable" to conclude that *these* facts make out a constitutional violation. That cases with different facts might present different concerns is no reason to "stand impotent before an obvious instance of a manifestly unauthorized exercise of power." *Baker*, 369 U.S. at 216.

B. Appellants Conflate Mere Politics With Invidious Discrimination

Appellants' line-drawing argument rests on the premise that some amount of "politics" is permitted in districting. That premise, however, conflates two separate concepts: mere use of "political classifications" and use of such classifications "in an invidious manner." *Vieth*, 541 U.S. at 307 (Kennedy, J., concurring); *see* Justin Levitt, *Intent is Enough: Invidious Partisanship in Redistricting*, 59 Wm. & Mary L. Rev. 1993, 2024-27 & n.147 (2018); Michael S. Kang, *Gerrymandering and the Constitutional Norm Against Government Partisanship*, 116 Mich. L. Rev. 351, 367-68 (2017). It may be impossible for legislators to make districting decisions without considering the political consequences of their actions. But that does not entitle legislators to make such decisions *for the purpose of* harming a disfavored political group. This Court has never held that "a naked purpose to disadvantage a political minority provides a rational basis for drawing a district line." *Vieth*, 541 U.S. at 337 (Stevens, J., dissenting); *cf. USDA v. Moreno*, 413 U.S. 528, 534 (1973) ("a bare congressional desire to harm a politically unpopular group ... cannot, in and of itself and without reference to some independent considerations in the public interest, justify [state action]" (cleaned up)).[2]

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[2] Appellants cite *Hunt v. Cromartie*, 526 U.S. 541 (1999), a racial-gerrymandering case, for the proposition that "a jurisdiction may engage in constitutional political gerrymandering." JS29, 32. However, they elide the second half of this sentence, which shows that what the *Hunt* Court meant is that "political gerrymandering," even when race-conscious, does not give rise to a *race-discrimination* claim. 526 U.S. at 551.

Reflecting this distinction, the Court has stated that certain "political considerations" may factor into districting. *Gaffney v. Cummings*, 412 U.S. 735, 752-53 (1973). For instance, states may consider party identification to promote proportional representation, *ibid.*, or to avoid pairing incumbents, *Karcher v. Daggett*, 462 U.S. 725, 740 (1983). But these same cases warn that map-drawers may not "invidiously minimiz[e]" the "voting strength" of a "political group." *Gaffney*, 412 U.S. at 754; *see also ibid.* ("courts have [no] constitutional warrant to invalidate a state plan ... because it undertakes, *not to minimize or eliminate the political strength of any group or party*, but to recognize it" (emphasis added)).[3]

This distinction resolves Appellants' professed justiciability concerns. Far from making redistricting a politics-free zone, the Constitution prohibits only "action *specifically intended* to punish or subordinate opposing partisans." Levitt, *supra*, at 2025 (emphasis added). And a requirement that a plaintiff plausibly plead and then prove such invidious intent—not mere political calculation or partisan disparities—will set a meaningful limit on judicial involvement.

Should the Court wish to cabin challenges even further, the District Court offered a solution: a *predominant*-intent requirement. Appellants call this predominance standard "vague and indeterminate." JS30. But this Court "has treated predominance as a

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[3] Analogously, race may be considered in districting for certain purposes, such as compliance with the Voting Rights Act, *Harris*, 137 S. Ct. at 1464, but a districting body may never act "invidiously to minimize or cancel out the voting potential of racial ... minorities," *Mobile v. Bolden*, 446 U.S. 55, 66 (1980).

judicially manageable standard" for "determining how much consideration of *race* is 'too much' in [districting]." A119 (emphasis added) (citing *Miller v. Johnson*, 515 U.S. 900, 916 (1995)). Especially since "*Gill* expressly analogized partisan gerrymandering claims to racial gerrymandering claims," A120, the same predominance standard would fit comfortably here. Indeed, "courts routinely engage" in predominant-purpose inquiries "in many areas of constitutional jurisprudence." *City of Indianapolis v. Edmond*, 531 U.S. 32, 46-47 (2000) (constitutionality of police checkpoint program turns on "primary purpose"); *see also McCreary Cnty. v. ACLU*, 545 U.S. 844, 860-62 (2005) (whether action impermissibly advances religion turns on "predominant purpose"). True, there may be cases—unlike this one—where discerning the legislature's predominant intent presents a close factual question. But fact-finders are routinely called upon to decide close questions of intent, legislative and otherwise. That does not render such cases *nonjusticiable*.

C. Appellants' Objection To "Social Science" Evidence Is Meritless

Lastly, Appellants impugn the District Court for "conclud[ing] that plaintiffs may rely on all manner of social science metrics ... to prove their case under a 'totality of the evidence'" approach. JS11, 31. In Appellants' view, this is "the antithesis" of a "judicially manageable standard." JS31. This argument, however, confuses legal standards *themselves* with the *evidence* offered to prove their violation.

As detailed below, the legal standards that govern Appellees' claims are the same familiar ones that

govern in this Court's other First Amendment, Equal Protection, and Art. I cases: for example, a State may not regulate political activity in a manner that discriminates based on viewpoint. *These* are the "standards" with which the political-question inquiry is concerned. Thus, in *Baker*, long before the Court had fleshed out the precise quantitative thresholds and evidentiary burdens in one-person-one-vote cases, it held that such cases are justiciable, because "[j]udicial standards under the Equal Protection Clause are well developed and familiar"—namely, its prohibition of arbitrary and invidious discrimination. 369 U.S. at 226.

Below, the District Court used statistical *evidence* (along with other evidence) to assess whether these generally applicable standards were violated. There is nothing unusual about this.[4] Courts routinely consult statistical or social-science evidence for this purpose. A121-124 (citing cases). For example, in *Castaneda v. Partida*, 430 U.S. 482 (1977), this Court held that Texas's system for selecting grand juries violated the Equal Protection Clause's prohibition of "purposeful discrimination" based on race. *Id.* at 501. In assessing whether that standard had been violated, the Court consulted a statistical technique called the "binomial distribution" model, which suggested that the "discrepancy between the expected and observed" numbers of Mexican-American jurors "did not

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[4] Nor is there anything unusual about courts considering multiple kinds of evidence, under a "totality of the evidence" approach, to determine whether a legal standard has been violated. In fact, this Court has held *in the gerrymandering context* that courts must do just that. *Harris*, 137 S. Ct. at 1481.

occur by chance." *Id.* at 495-96 & n.17, 501. But *Castaneda* did not adopt that statistical model as a "standard." Rather, like the District Court here, it relied on it as *evidence* to conclude that a familiar legal principle had been violated. It would be error to "treat a mere form of evidence as the very substance of a constitutional claim." *Harris*, 137 S. Ct. at 1481.

The statistical analyses that *Common Cause* Appellees presented below—Drs. Chen and Mattingly's large-scale simulations based on alternative maps—were appropriately tailored to the legal standards at hand. Appellants' dismissive discussion of "social science metrics" focuses on the type of statewide statistics—the "efficiency gap" and other indicia of "partisan asymmetry"—relied upon by the plaintiffs in *Gill*. 138 S. Ct. at 1932-33. Chen and Mattingly's analyses are completely different. They proved packing and cracking on a district-by-district basis by comparing the actual districts of the 2016 Plan to the gamut of "hypothetical district[s]" that could have been drawn instead—exactly as Gill suggested. *Id.* at 1931; *see also id.* at 1936 (Kagan, J., concurring) (discussing suitability of "alternative maps" for proving dilution and citing Dr. Chen's *amicus* brief in *Gill*); *cf. Harris*, 137 S. Ct. at 1477-79 (calling alternative maps "key evidence" in racial-gerrymandering cases).

In any event, there is no need in this case to settle definitively the role of social-science evidence in partisan-gerrymandering litigation. Here, that evidence was merely corroborative of what Appellants, their witnesses, and their counsel readily admitted.

III. THE 2016 PLAN AND ITS INDIVIDUAL DISTRICTS ARE UNCONSTITUTIONAL

The District Court correctly held that the 2016 Plan violates the First Amendment, the Equal Protection Clause, and Art. I. Appellants do not challenge the findings of fact underlying these holdings, let alone assert clear error. And, while they lodge various complaints about the District Court's legal analysis, they do not seriously contend that the Plan actually *complies with* these constitutional standards—nor could they.

A. The District Court's First Amendment Holding Is Correct

The First Amendment "safeguards [the] right[s] to ... political expression and political association," *McCutcheon*, 572 U.S. at 203, and it protects "the right of qualified voters, regardless of their political persuasion, to cast their votes effectively," *Williams v. Rhodes*, 393 U.S. 23, 30-31 (1968). It is thus "a vital guarantee of democratic self-government." *U.S. Telecom Ass'n v. FCC*, 855 F.3d 381, 427 (D.C. Cir. 2017) (Kavanaugh, J., dissenting). As five Justices have recognized, partisan gerrymandering strikes at the core of these rights. *Gill*, 138 S. Ct. at 1938 (Kagan, J., concurring); *Vieth*, 541 U.S. at 314 (Kennedy, J., concurring). And Appellants' counsel has conceded that facts like those presented here would prove a First Amendment violation. *Ante* at 26.

As the District Court observed, the 2016 Plan runs afoul of four well-established lines of First Amendment precedent. A275-279. First, the Plan burdens protected activity based on the "motivating

ideology ... of the speaker." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995). Indeed, the written criteria that Appellants adopted "favor one set of political beliefs over another" on their face. A275. Second, the Plan regulates protected activity "based on the identity of the speaker." *Citizens United v. FEC*, 558 U.S. 310, 340-41 (2010). Third, by "penalizing" individuals "because of ... their association with a political party[] or their expression of political views," the Plan constitutes unlawful First Amendment retaliation. *Vieth*, 541 U.S. at 314 (Kennedy, J., concurring). And fourth, the Plan does not constitute a "reasonable, non-discriminatory" election regulation. *Burdick v. Takushi*, 504 U.S. 428 (1992). Appellants make no attempt to reconcile the Plan with these well-settled principles.

The District Court also correctly found that these violations caused the North Carolina Democratic Party and the voter-plaintiffs to suffer well-recognized First Amendment harms, including "decreas[ed] ability to mobilize their party's base, persuade independent voters to participate, attract volunteers, raise money, and recruit candidates." A70. Again, these factual findings were not disputed.

Lastly, the District Court correctly held that this burdening of First Amendment rights was not narrowly tailored to a compelling state interest. A111. Indeed, Appellants "never argued [below] ... that the 2016 Plan's express partisan discrimination advance[d] *any* democratic, constitutional, or public interest." A110. Appellants now implausibly assert that the Plan advances the purported state interest of "avoid[ing] the concentration of majority-party voters

in a small number of districts." JS31. But this *post hoc* "interest," never articulated during the creation of the Plan or at trial, is tantamount to calling it a positive good to crack Democratic constituencies in order to increase Republican power. That is not a legitimate state interest; it is a private, partisan one.[5]

Appellants' criticisms of the District Court's First Amendment analysis miss the mark. First, the District Court did not "divine" these principles, JS11; they have been established law for generations. Second, the District Court's analysis would not banish all political considerations from the redistricting process. *Ante* at 28-29; *see Vieth*, 541 U.S. at 314-15 (Kennedy, J., concurring) (refuting this argument). Third, the District Court did not err by refusing to require a heightened "effects" showing. JS32. "This Court's decisions have prohibited" state action that unjustifiably burdens First Amendment rights, "however slight[ly]." *Elrod v. Burns*, 427 U.S. 347, 358 n.11 (1976). Lastly, Appellants are incorrect that the District Court's First Amendment analysis "would invalidate nearly every legislatively drawn districting plan in the country." JS34. By and large, only plans drawn by States under one-party control would even be at risk of a challenge, and only those with the demonstrable intent (or predominant intent) and effect of

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[5] Appellants assert that "there are First Amendment values on both sides of the political ledger"—as if the abridgement of Democrats' First Amendment rights could be justified by the purported interest of enhancing those of Republicans. JS33. *But see McCutcheon*, 572 U.S. at 191 (government may not "restrict the political participation of some ... to enhance the relative influence of others").

discriminating on the basis of political beliefs, activity, or association would be "invalidate[d]."

B. The District Court's Equal Protection Holding Is Correct

The Equal Protection Clause requires "that all persons similarly situated ... be treated alike." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). It has long prohibited state action that intentionally disfavors a class of citizens absent sufficient justification. Where a constitutional right is burdened, that means narrow tailoring to a compelling state interest. *Id.* at 440. The District Court faithfully applied this precedent via its "three-step framework," which required "discriminatory intent," "discriminatory effects," and lack of justification in terms of a "legitimate redistricting objective." A138-139.

The District Court correctly found that the cracking and packing of 12 of the 13 districts in the 2016 Plan was motivated—not just in part, but *predominantly*—by the invidious intent to burden Democrats' political rights. A35. This was not meaningfully disputed below, and Appellants themselves, their mapdrawer, their experts, and their counsel have all admitted as much. Moreover, Drs. Mattingly and Chen's simulations controlled for both "clustering" of Democrats and incumbent protection and showed that neither could explain the extreme partisan deviation of these districts. A211-212.

The District Court also correctly found that the 2016 Plan had a "discriminatory effect." It believed that this required a showing of long-term harm—*i.e.*, "that the dilution of the votes of supporters of [the]

disfavored party ... is likely to persist in subsequent elections." A152. And it found that requirement met based on the actual election results under the 2016 Plan and its predecessor plan, as well as the statistical and simulation analyses of multiple highly qualified experts. A168-170. Appellants do not challenge these factual findings.

If anything, this "effect" analysis was too demanding. Setting aside *Davis v. Bandemer*—whose Equal Protection test (as opposed to its justiciability holding) has effectively been abandoned by this Court—the only "effect" inquiry in this Court's Equal Protection cases has been whether the challenged intentional discrimination caused the plaintiff to suffer an Art. III injury-in-fact. Faithful application of an invidious-intent requirement—especially with a predominance gloss—will appropriately limit judicial intervention. There is no need to engraft a "durability" requirement foreign to Equal Protection doctrine. *Cf. Bethune-Hill v. Virginia Bd. of Elecs.*, 137 S. Ct. 788, 798-99 (2017) ("[T]he [Equal Protection] violation in racial gerrymandering cases stems from the racial purpose of state action, not its stark manifestation.").

Finally, the District Court correctly held that Appellants' intentional discrimination was not tailored to any rational—let alone compelling—state interest. A222. Appellants did not contend otherwise below, and the *post hoc* "interests" they muster on appeal are unsupported and unpersuasive. *Ante* at 34-35.

C. The District Court's Art. I Holding Is Correct

The States have no "reserved" power over *federal* elections—districting included. They have only those powers that the Constitution expressly grants them. *Gralike*, 531 U.S. at 522-23; *see also Thornton*, 514 U.S. at 805. Art. I, § 4 (the Elections Clause) grants State legislatures the limited power to set the "Times, Places and Manner" of federal elections. By contrast, Art. I, § 2 grants "the People"—*not* State legislatures—the power to "cho[ose]" their representatives. Together, these clauses provide a "safeguard against manipulation of electoral rules by politicians and factions in the States to entrench themselves," thereby "ensur[ing] to the *people* their rights of election." *Ariz. State Legis.*, 135 S. Ct. at 2672 (citation omitted).

It is well-settled that, when the States legislate with respect to federal elections, they may act only "within the exclusive delegation of power under the Elections Clause." *Gralike*, 531 U.S. at 522-23. Whatever the bounds of that delegation may be, three limits are clear: it is "not ... a source of power" (1) "to dictate electoral outcomes," (2) "to favor or disfavor a class of candidates," or (3) "to evade important constitutional restraints." *Ibid.*; *Thornton*, 514 U.S. at 833-34. This flows directly from Art. I, § 2, which assigns the task of "cho[osing]" representatives to "the People" alone. As the District Court unanimously found, the 2016 Plan is *ultra vires* under each of these tests.

Appellants object that the District Court's Elections Clause analysis is "[e]ntirely [n]ovel." JS34. In fact, it follows *a fortiori* from *Gralike*. In that case, Missouri adopted a law requiring candidates' posi-

tions on term limits to be included on the ballot. The Court held that this exceeded Missouri's "delegated power" under the Elections Clause because it was "designed to favor candidates" with one position and "disfavor those" with an opposing view—and thereby, to "dictate electoral outcomes." 531 U.S. at 523-26. But Missouri's attempt to bias voters' choices by providing them with selected information was subtle compared to North Carolina's approach. The 2016 Plan *literally* sought to "dictate" the outcome of North Carolina's congressional elections by fixing the composition of the State's delegation ("10 Republicans" and "3 Democrats"), and the party of each district's winning candidate, before a single vote was cast.

Rather than explain how this can be squared with *Gralike*, Appellants raise their perennial objection that applying settled Elections Clause precedent to districting legislation would banish politics from the process. JS35. The answer remains the same: it is not awareness of political outcomes, or even the desire to achieve them, that results in a violation. It is demonstrable invidious intent. And if the Court believes a safe harbor for "some" discrimination is appropriate, the predominance standard is available.

D. Appellants Offer No Colorable Defense Of The 2016 Plan On The Merits

The closest Appellants come to an actual substantive defense of the 2016 Plan is a single paragraph at the very end of their Jurisdictional Statement. There, they assert that the Plan must be constitutional—despite its rampant packing and cracking, its concededly invidious motivation, and its express viewpoint

discrimination—because it splits fewer counties and precincts than some previous maps did. JS36-37.

But, as this Court observed just last year, the Constitution "does not prohibit misshapen districts. It prohibits unjustified ... classifications." *Bethune-Hill*, 137 S. Ct. at 798-99. The infirmity "stems from the [improper] purpose," not the ultimate "manifestation" of that purpose in the form of divided counties or irregular borders. *Ibid.* Thus, a map drawn with predominantly invidious intent—as this one concededly was—violates the Constitution, even if it superficially complies with "traditional redistricting principles." *Ibid.*; *see also Gill*, 138 S. Ct. at 1941 (Kagan, J., concurring) ("With [modern] tools, mapmakers can capture every last bit of partisan advantage, while still meeting traditional districting requirements.").

* * *

"The first instinct of power is the retention of power." *McConnell v. FEC*, 540 U.S. 93, 263-65 (2003) (Scalia, J., dissenting), *overruled in part by Citizens United*, 558 U.S. 310. Because "the State is itself controlled by the political party ... in power," the courts play an "important role" in ensuring "that those in power [are not] using electoral rules" as a "pretext" for suppressing "electoral competition." *Clingman v. Beaver*, 544 U.S. 581, 603 (2005) (O'Connor, J., concurring). Here, there was no "pretext" at all: Appellants openly and unabashedly used State power to engage in facially invidious discrimination, for the admitted purpose of destroying meaningful electoral competition. Appellees have standing; such a case is justiciable; and Appellants have no colorable defense on the merits. This Court should therefore affirm.

CONCLUSION

The Court should summarily affirm or note probable jurisdiction.

Respectfully submitted,

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November 2, 2018